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Supreme Court, U.S.
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No. 88-1892

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

OPERATING ENGINEERS PENSION TRUST, *et al.*,
Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as
CONSOLIDATED CONCRETE PUMPING,
Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners Operating Engineers Pension Trust, *et al.* ("Trusts"), respectfully reply to the Opposition filed on behalf of respondent Thomas G. Daniel ("Daniel") as follows:

THE ISSUES PRESENTED IN THE PETITION WERE RAISED AT THE EARLIEST TIME PERMITTED BY NINTH CIRCUIT LAW.

A. Each Issue Presented In The Petition Was Settled Law In The Ninth Circuit When This Action Was Litigated In The District Court.

Daniel opposes granting the petition on grounds that the questions presented were not raised in the district court or in the Trusts' opening brief to the Ninth Circuit. However, Daniel fails to note that these issues could not have been presented to the district court or to the three judge panel of the Ninth Circuit because each issue involved settled law of the Ninth Circuit at the time.

The pretrial conference order establishing issues for trial was filed December 15, 1986. (Opposition, p. A-1.) By that time, the Ninth Circuit had already settled its view that LMRA § 301 grants jurisdiction to determine the existence of a collective bargaining agreement in *Griffith Construction Co. v. Carpenters,* 785 F.2d 706, 712 (9th Cir. 1986) filed March 20, 1986. *See Electrical Workers v. Brink Construction Co.,* 825 F.2d 207, 212 (9th Cir. 1987) filed August 17, 1987, citing *Griffith* as binding precedent for the rule that LMRA § 301 grants courts jurisdiction to determine the issue of the contract's *existence* and *validity,* as well as to resolve *breach* of contract disputes. The Ninth Circuit's view that "general principles of contract law apply to the formation of collective bargaining agreements" was settled not later than August 7, 1986, in *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.,* 795 F.2d 1501, 1504 (9th Cir. 1986).

Likewise, the Ninth Circuit's view that ERISA § 515 permits a defense going to the existence or validity of the agreement requiring employee benefit contributions was

settled by *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501, 1505 (9th Cir. 1984).[1] And, the decision in *Carpenters v. Russell,* 726 F.2d 1410, 1416 (9th Cir. 1984) settled the Ninth Circuit's view that ERISA § 502(g)(1) [29 U.S.C. § 1132(g)(1)] grants discretion to award attorney's fees to defendant employers who prevail in actions brought by employee benefit plans to collect delinquent contributions.

B. Litigants Are Not Permitted To Contest Settled Law Of The Ninth Circuit In The District Court Or In The Ninth Circuit Except Upon En Banc Review.

In the Ninth Circuit, any three judge panel of the Court of Appeals, as well as any district court, is "bound to follow" earlier decisions of any three judge panel of the Circuit. *Operating Engineers Pension Trust v. Beck Engineering,* 746 F.2d 557, 567-68 (1984); *Mesa Verde Construction Co. v. Laborers,* 820 F.2d 1006, 1013 (9th Cir. 1987) ["we are not permitted to overrule prior panels' interpretations of the Act, even with intervening NLRB case law," and such arguments "should be addressed to the full court in a petition for rehearing en banc"]. After the Ninth Circuit's opinion holding for the Trusts was

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[1]Since the petition was filed, the Ninth Circuit has ruled that an alleged conflict of interest on the part of a consultant to an employee benefit plan may be raised as an affirmative defense in an action to collect delinquent contributions under ERISA § 515. *Board of Trustees v. California Cooperative Creamery,* ____ F.2d ____, No. 87-2931, Sl.Op. pp. 6606-07 (9th Cir. June 21, 1989). Although Daniel denies that the Seventh Circuit is in conflict with the Ninth Circuit on this important and recurring issue, the Seventh Circuit's *en banc* decision in *Central States Pension Fund v. Gerber Truck Service, Inc.,* 870 F.2d 1148, 1149, 1151-53 (7th Cir. 1989) unequivocally announces a broader rule of decision which precludes defenses pointing to defects in contract formation.

withdrawn and the unpublished memorandum affirmed the judgment for Daniel, the Trusts properly raised broader issues in a petition for rehearing *en banc.* Now the petition for writ of certiorari presents the important issue of jurisdiction and the conflicts among the circuits for resolution by this Court.

C. The Issues Presented By The Petition Are Properly Before This Court, And Review Should Be Granted.

This Court has authority to resolve an issue even when the issue is not raised at the earliest opportunity. *City of Houston v. Hill,* ____ U.S. ____, 107 S.Ct. 2502, 2512, n. 16 (1987) [issue resolved on the merits even though not raised until petition for rehearing *en banc,* and neither majority nor dissent of *en banc* court addressed the issue]. Of course, the issue of jurisdiction may be addressed at any time, "even if not raised by the parties." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398, 99 S.Ct. 1171, 1175 (1979). The Court is not precluded from addressing the merits of an important, recurring issue squarely presented in the petition, even if not raised in the courts below. *Carlson v. Green,* 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470 (1980). The views of the Ninth Circuit are fully explicated in its decisions settling the issues raised in the petition. The conflicts among the circuits on the jurisdictional issue and on the recurring issues involving interpretation of federal statutes can be resolved only by this Court.

CONCLUSION

Based on the foregoing, the petition should be granted.

Dated: June 27, 1989

Respectfully submitted,

WAYNE JETT,*
JETT & LAQUER
Counsel for Petitioners.
**Counsel of Record.*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

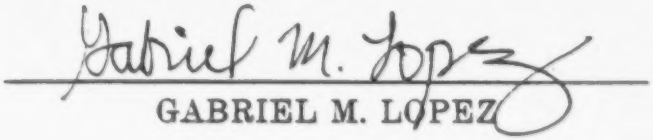
On June 28, 1989, I served the within Reply in Support of Petition for Writ of Certiorari in re: "Operating Engineers Pension Trust, et al. vs. Thomas G. Daniel, an individual doing business as Consolidated Concrete Pumping" in the Supreme Court of the United States, October Term, 1988, No. 88-1892; on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Mark T. Bennett, Esq.
MERRILL, SCHULTZ & WOLDS, LTD.
1855 First Avenue, Suite 100
San Diego, California 92101

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 1989, at Los Angeles, California.



GABRIEL M. LOPEZ